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No.

In The Supreme Court of the United States

October Term, 1984

LESLIE LUBIN,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and THE BOARD OF EXAMINERS OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND/OR THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

MORRIS WEISBERG
Attorney for Petitioner
15 Park Row
New York, NY 10038
(212) 964-0492

53 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether respondents violated petitioner's federal constitutional right to a procedural due process evidentiary hearing by revoking his license on June 30, 1976, as a teacher of homebound children without a hearing of evidence of disputed factual issues whether he had the qualifications for such license prescribed by respondents' by-laws, and by their September, 1971, announcement of examination for license as a teacher of homebound children?

2. Whether the four month statute of limitations in section 217 of the New York Civil Practice Law and Rules bars the petitioner from maintaining this suit, commenced July 2, 1980, to annul the revocation of his teaching license, although arbitration of a grievance about such revocation of license is still pending, notice that his administrative appeal to respondents would not be decided was not given to petitioner until February 16, 1978, and respondents did not make their final decision to deny petitioner's demand for reinstatement as a teacher until March 7, 1980?

Reported below: 60 N.Y.2d 974, 471 N.Y.S.2d 256, affirming 95 A.D.2d 778, 463 N.Y.S.2d 262.

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GROUNDS FOR INVOKING THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

(i) Date of judgment or decree sought to be reviewed: Order by Court of Appeals of the State of New York, dated and entered in the office of the Clerk of said Court on December 1, 1983 which unanimously affirmed an order of the Appellate Division, Second Judicial

Department of the New York Supreme Court, dated April 14, 1983, which unanimously reversed a judgment of the New York Supreme Court, Kings County, entered on March 31, 1982, which had granted the petition, and dismissed the petition, as barred by the four month statute of limitations in CPLR section 217.

(ii) An order was made by the New York Court of Appeals on February 16, 1984, which denied petitioner's motion for reargument of the said order dated December 1, 1983.

(iii) Statutory provision believed to confer on the Supreme Court of U.S. jurisdiction to review the said order of the said Court of Appeals by writ of certiorari: 28 U.S.C. section 2104.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 217 of the Civil Practice Law and Rules of the State of New York provides:

"Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty; or with leave of the court where the petitioner or the person whom he represents, at the time such determination became final and binding upon him or at the time of such refusal, was under a disability specified in section 208, within two years after such time."

New York Civil Practice Law and Rules section 214(2) provides:

"The following actions must be commenced within three years:

* * *

2. an action to recover upon a liability, penalty or forfeiture created or imposed by statute except as provided in sections 213 and 215."

New York Civil Practice Law and Rules section 204(b) provides:

"(b) Where it shall have been determined that a party is not obligated to submit a claim to arbitration, the time which elapsed between the demand for arbitration and the final determination that there is no obligation to arbitrate is but a part of the time within which an action upon such claim must be commenced. The time within which the action must be commenced shall not be extended by this provision beyond one year after such final determination."

STATEMENT OF THE CASE

A. The Facts

Petitioner, born March 28, 1943 (54), graduated in 1967 from the City College of the City of New York and received a Bachlor of Arts degree (54).

In 1969, petitioner graduated from Adelphi University, in New York, and received a Master of Arts degree (54).

Beginning in 1967, petitioner was employed by the Board of Education of the City of New York as a substitute teacher (54).

Petitioner was examined and licensed by the Board of Education as a substitute teacher of early childhood (kindergarten) pupils, common branches, and social studies (54).

Petitioner applied for license as a regular teacher of homebound children, announced on September 15, 1971 (40-42). He passed such examination and received such license (78).

Petitioner applied for a license as a regular teacher of homebound children, announced on November 3, 1972 (87a-88). He passed such examination and received such license, dated September 1, 1973 (19).

On March 14, 1974, petitioner received notice of appointment as a regular teacher of homebound children, effective March 20, 1974 (20) for a probationary period of five years, which was reduced to three years, effective October 1, 1974.

On March 20, 1974, petitioner signed two duplicate

original certificates of commencement of service as a regular teacher of homebound children, and his principal signed one such certificate on March 27, 1974 (22).

Two years later, on April 21, 1976, the Board of Examiners wrote to the petitioner (23):

> "The Board of Examiners regrets to inform you that the extension of the validity of your license as a regular teacher of Homebound Children issued to you as a result of the Nov. 1971 Examination has been denied since, in connection with this license (2) you failed to meet the preparation requirements in full. The Chancellor and the Administrator of Business Affairs have been notified that your license will terminate on June 30, 1976."

Petitioner had a New York State certificate which qualified him to teach physically handicapped children, including homebound children. Respondents refused to give effect to such certificate. Petitioner's employment as a regular teacher of homebound children was terminated on June 30, 1976 (80).

From September, 1973 to January, 1974, petitioner served as a regular substitute teacher of homebound children at P.S. 188 under a Federal Program and Federal guidelines, the Emergency Employment Act. His teaching service was rated "satisfactory" by the principal then in charge of P.S. 188, but in 1981 a different principal reported that petitioner's service was not satisfactory.

The answer alleged (81):

> " . . . petitioner filed a grievance pursuant to the collective bargaining agreement between his union, the

United Federation of Teachers and the Board of Education seeking *inter alia* reinstatement of his 1972 license and reappointment to a regular teaching assignment.

38. Ultimately, it was decided at Step III of the grievance proceedings that the issues raised by the petitioner were not grievable under the contract."

Petitioner's labor union demanded arbitration of this grievance which is now pending, undecided.

Respondents' decision at Step III of the grievance procedure that the issues raised therein were not grievable under the collective bargaining contract was made after July 2, 1980. Such decision, made after July 2, 1980, did not make this suit untimely under the four month statute of limitations in CPLR section 217.

The answer further alleged (81):

"38. . . . Furthermore, with respect to petitioner's appeal proceedings, the Chancellor indicated by letter dated February 16, 1978, that no decision would be rendered by the Chancellor regarding petitioner's dismissal. (See Respondents' Exhibit '18' annexed hereto). On information and belief, no further administrative remedies were pursued by petitioner."

The Board's by-laws provided for review by appeal to the Chancellor from a recommendation for termination of employment of a probationary teacher for unsatisfactory service. The by-laws did not provide for appeal to the Chancellor from revocation of a license by the Board of Examiners. In these circumstances, the petitioner could not seek judicial review of the Chancellor's decision to make no decision on the recommendation for termination of petitioner's employment as a probationary teacher.

In order to "clarify your status for you," the Board of Education wrote to the petitioner on November 29, 1979 (26):

"Our records indicate that you were regularly appointed to the Bureau for the Physically Handicapped from the 9/1/72 list, effective March 20, 1974. You were simultaneously reached for appointment from the 9/1/73 Homebound Eligible List. Inasmuch as you could only accept one appointment, your appointment from the 9/1/72 list was certified and your name was returned to the 9/1/73 Eligible List.

Effective June 30, 1976, your Homebound license dated 9/1/72 was terminated by the Board of Examiners for failure to meet eligibility requirements. This terminated your services as an appointed teacher of Homebound. The 9/1/72 Homebound license was never reinstated.

In June 1979, when the Board of Examiners informed you of the extension of the validity of the 9/1/73 Homebound license, this Office erroneously reinstated you to a position based on the 9/1/72 license. As soon as the error was discovered, the assignment was rescinded inasmuch as the 9/1/72 license was no longer valid.

Your name appears on the 9/1/73 Homebound Eligible List. However, in accordance with Section 2573 of the State Education Law, appointments to the teaching service shall be made from the first three persons on appropriate eligible lists. This law was utilized when you were the only Homebound Teacher available on the 9/1/73 eligible list.

Prior to your appointment from the 9/1/72 eligible list, your license based on this list was valid for substitute service from the date of issuance until your date of appointment on March 20, 1974. Your license based on the 9/1/73 list was valid from the date of issuance through July 1, 1980 for substitute service."

On March 7, 1980, the Board of Education wrote to the petitioner (27):

> "In response to your recent communication, please be advised that the reason you were not selected for appointment as a Homebound teacher was that the Division of Special Education exercised its discretionary authority in not requesting your appointment."

B. Proceedings Below

On July 2, 1980, petitioner sued the respondents in the New York Supreme Court, Kings County, for a judgment under Article 78 of the New York Civil Practice Law and Rules (CPLR) reinstating the petitioner as a regular teacher of homebound children; and validating petitioner's license as a teacher of homebound children issued as a result of his having passed the examination therefor announced on September 15, 1971 (called the "1972 license"), and, also, his license as a teacher of homebound children, dated September 1, 1973 (10-20), called the "1973 license").

On August 15, 1980, respondents made a motio to dismiss the petition, before answer, on the ground that the proceeding was not commenced within the four month period of limitation prescribed by CPLR section 217 (32-36); and on the ground that the petitioner failed to exhaust his contractual and administrative remedies (37-38). On January 7, 1981, the New York Supreme Court, Kings County (COOPER, J.), denied respondents' cross-motion to dismiss the petition. The Court said (189-190):

"In the case at bar the respondent Board of Education issued erroneous rulings which misled the petitioner into believing that the petitioner retained a status which the Board was later to claim petitioner did not have. The respondents have admitted that 'due to confusion with respect to which of petitioner's licenses had been revoked, the personnel division of the Board of Education erroneously stated to petitioner that his 1973 license had been revoked.' Petitioner thus directed his efforts into being reinstated to his position on the basis that his 1973 license was not revoked. Even though the respondents later accepted his argument as to the continued existence of his 1973 license, petitioner was not reinstated to his previous capacity.

Because the determination regarding the validity of petitioner's 1972 license was so closely intertwined with the effect that the determination regarding the 1973 license had on petitioner's status, the statute of limitations did not begin to run until the respondents issued its own unequivocally clear and final determination as to whether either of petitioner's licenses were in effect. Furthermore, a statute of limitations does not begin to run until after completion of the grievance procedure (Whitley v. Board of Education, 65 AD2d 821, 410 NYS2d 345 [2d Dept. 1978]).

The grievance in this matter has been held not to be covered by the contract. Under the contract between the Board of Education and the United Federation of Teachers, the next step would be arbitration. However, since the grievance is not covered by the contract it cannot go to arbitration (Acting Superintendent of Schools of Liverpool Central School District 42 NY2d 509, 399 NYS2d 189 [1977]). Petitioner has thus exhausted his administrative remedies.

The appeal that was filed before the Commissioner of Education seeking relief similar to that sought in the third cause of action—extension of his 1973

license—does not apply to the relief sought in either of the first two causes of action, i.e., reinstatement to his position as Teacher of the Homebound and reinstatement of his 1972 license for that position.

For the above stated reasons, the respondents' cross motion to dismiss the first two causes of action is denied. The third cause of action for reinstatement of the 1973 license has been rendered moot by actions of the State Legislature . . . ."

On April 6, 1981, respondents served an answer to the petition, which denied the factual allegations in the petition (73-77).

The answer also alleged (79):

"32. . . . A review of petitioner's credentials revealed that he had not completed a practicum in teaching physically handicapped children nor has he completed one full year of paid-time *satisfactory* experience (320 days) as a teacher of physically handicapped children which could be offered in substitution for the practicum."

As a second defense, the answer alleged (82):

"41. The proceeding herein was not commenced within the statute of limitations prescribed under CPLR 217."

The September 15, 1971 announcement of examination for license as a teacher of homebound children, reads, in part (41):

"PREPARATION:

A baccalaureate degree; said preparation shall include an undergraduate or subsequent courses:

* * *

LICENSE AS TEACHER OF HOMEBOUND CHILDREN IN DAY SCHOOLS ELIGIBILITY REQUIREMENTS

2. (a) Completion of a program approved for the teaching of physically handicapped children (orthopedic, cerebral palsied and similar handicaps), at an institution or institutions having a program registered and/or approved by the State Education Department for such preparation; or

NOTE: PETITIONER HAS PERMANENT STATE CERTIFICATION EFFECTIVE SEPTEMBER 1, 1975 AT APPROVED INSTITUTIONS REGISTERED BY THE STATE EDUCATION DEPARTMENT. PAGE 157 AREA OF CERTIFICATE SPECIAL CLASSES OF THE ORTHOPEDICALLY AND SIMILARLY HANDICAPPED EFFECTIVE DATE: SEPTEMBER 1, 1975 REISSUED—OCTOBER 23, 1981.

2.(b) Completion of a 14 semester hour program to include the following areas: AT least one course must be offered in each area:

(a) A practicum in teaching physically handicapped children (orthopedic, cerebral palsied and similar handicaps).

* * *

Substitution under Preparation 2(b)(1): An applicant may offer in lieu of the practicum (for six semester hours), one year of paid full-time satisfactory experience as teacher of physically handicapped children. This year of teaching physically handicapped children must be in addition to any teaching experience offered as substitution under Preparation 1(d)."

As a fifth defense, the answer alleged (83):

"44. Petitioner failed to meet the eligibility requirements in full for the 1972 license as Teacher of Homebound Children (completion of 320 days of

satisfactory service) by the required date set forth in the Notice of Examination (September 1, 1975).

45. Petitioner completed only 220 days of satisfactory service under the 1972 license for Teacher of Homebound Children; his remaining service was found to be unsatisfactory. (See Respondents' Exhibits '9' through '16' inclusive, annexed hereto."

Respondent's answer, quoted above, erroneously stated that one full year of teaching service consisted of 320 teaching days. Instead, one full year of teaching service consists of 160 teaching days, as stated by Maralyn Fairberg, respondents' attorney, Record, p. 167. Therefore, the allegation in paragraph 45 of the answer, quoted above, that the petitioner completed 220 days of satisfactory service, teaching homebound children, was an admission that petitioner fully satisfied the alternative requirement of "one year of paid full-time satisfactory experience as teacher of physically handicapped children."

An interim decision by the trial court on May 28, 1981, stated:

"Petitioner had until September 1, 1975 to complete all of the eligibility requirements in order to keep the 1972 license (see Respondents' Exhibit 1, page 1). Respondents contend that petitioner needed 320 days of satisfactory teaching service to complete his eligibility requirements and that petitioner only had 220 days of service. Petitioner contends that he had in excess of 400 days of teaching service. From the papers before the Court, more particularly respondents' Exhibit 8 and petitioner's Exhibit M, it is unclear whether petitioner taught the 320 days at issue. A hearing is required to determine this issue."

The trial court set down for evidentiary hearing a

sharp factual dispute between the parties whether the petitioner completed one full year of teaching physically handicapped children (162). Instead of an evidentiary hearing, respondents' attorney unilaterally sent questionnaires to principals of schools in which petitioner had served, who replied in some cases that they had no records of petitioner's service therein. In other cases, respondents' attorney questioned replies favorable to petitioner, and obtained "corrected" replies unfavorable to petitioner. Petitioner contends that the Board of Education should have given the petitioner a constitutional due process evidentiary hearing on such factual disputes instead or revoking petitioner's teaching license without such due process evidentiary hearing.

The Trial Court resolved such factual disputes in favor of the petitioner, and said in a final decision dated January 25, 1982 (193):

> "After a review of the record, the Court finds that petitioner has satisfied the necessary 160 days of teaching service within the purview of the required subject area."

Judgment granting the petition was entered and filed on March 31, 1982 (4-7).

On April 14, 1983, the Appellate Division, Second Department, of the New York Supreme Court, reversed the said judgment, and said (205-206):

> "Assuming, arguendo, that Special Term correctly decided that the determination in issue became final and binding upon the petitioner only when the appellants 'issued its [sic] own unequivocally clear and final determination as to whether either of petitioner's

licenses [for the teaching of homebound children] were [still] in effect,' the four months within which the petitioner was required to commence the instant proceeding (CPLR 217) must have commenced running no later than November 29, 1979, the date upon which he was notified by the board of education that his 1973 license as 'Teacher of Homebound Children' was valid but that he had been appointed to his former position as a teacher of homebound children from the 1972 rather than the 1973 eligibility list and that his appointment thereunder had been terminated on June 30, 1976 upon the revocation of his 1972 license. Accordingly, the instant proceeding, which was not commenced until July 1, 1980, is time barred.

The ensuing correspondence between the parties, which was in effect, an application for reconsideration by the board of education of its prior determination, neither tolled the applicable Statute of Limitations nor began anew the time within which review could be sought (See Matter of De Milio v. Borghard, 55 NY2d 216, 221-222; Matter of Trivedi v. State Bd. of Law Examiners, 86 AD2d 719; cf. Matter of Camperlengo v. State Liq. Auth., 16 AD2d 342).

On this analysis, we need pass upon no further issue."

On December 1, 1983, the Court of Appeals of the State of New York, unanimously affirmed the aforesaid Appellate Division order. The New York Court of Appeals said that petitioner's suit was time barred by the four month statute of limitations in CPLR section 217; that he was aggrieved by the revocation of his license and termination of his employment on June 30, 1976, so that such statute of limitations began to run on June 30, 1976 and his right to sue became barred by such statute on October 31, 1976.

REASONS FOR ALLOWANCE OF THE WRIT

1. Petitioner's regular license to teach homebound children gave him a right to work as a teacher of homebound children; and without such license, petitioner could not lawfully work at his profession of teaching homebound children.

Revocation of petitioner's regular license to teach homebound children, took away from the petitioner, his right to work at his profession of teaching homebound children.

Such deprivation of petitioner's right to work at his profession was made on the ground that the petitioner did not have one of the prescribed qualifications for his teaching license, namely, "one year of paid full-time satisfactory experience as teacher of physically handicapped children" (41).

Petitioner disputed the charge that he did not have this qualification for license, and he claimed that he had more than one year of full time paid experience teaching physically handicapped children.

In these circumstances, the respondent Board of Education could not constitutionally revoke his teaching license without giving him a procedural due process hearing of evidence under oath whether he had or lacked one year of paid full-time teaching of physically handicapped children.

The fact that petitioner was a probationary teacher, who did not have permanent tenure of employment, did not have the legal effect of giving him no constitutional right to a due process hearing of evidence whether he had or lacked one year of paid full

time experience teaching physically handicapped children, because petitioner had a permanent license to teach, which the school board was attempting to take away from him by asserting that he lacked one year of full time paid experience teaching physically handicapped children. Such permanent license was valuable property of which the petitioner could not constitutionally be deprived without a due process hearing of evidence whether he had or lacked this qualification requirement.

In *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 283-284 (1976), the Court decided that a teacher who did not have tenure had a legally sufficient civil rights cause of action against the school board for refusing to rehire him because he told a radio station about the adoption of a dress code for the students at his school. The Court said:

> "Doyle's claims unde the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, Board of Regents v. Roth, 408 US 564, 33 L. Ed. 2d 542, 92 S. Ct. 2701 (1972), he may nonetheless establish a claim to reinstatement, if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms. Perry v. Sindermann, 408 US 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972)."

Moreover, the respondents based their *ex parte* unilateral decision to revoke petitioner's license as a regular teacher of homebound children, upon reports by principals of schools in which petitioner had served

as a teacher that the petitioner bribed homebound children to lie about the teaching instruction which he had given them, and that petitioner lied about his prior teaching experience (99, 103).

Petitioner had a due process constitutional right to an evidentiary hearing to clear his name of these allegations which damaged his reputation, and injured his opportunities of obtaining employment in his profession as a teacher. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Wisconsin v. Constantineau*, 400 U.S. 434, 437 (1970); *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898 (1960); *Peters v. Hobby*, 349 U.S. 331, 353 (1954); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1950).

In *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 105 (1962), the Court said:

> "Petitioner was clearly entitled to notice of and a hearing on the grounds for his rejection either before the Committee or before the Appellate Division."

See, also: *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1914).

The foregoing constitutional arguments were made for the first time in petitioner's brief in support of his motion for reargument of this decision of the New York Court of Appeals, dated December 1, 1983, which unanimously affirmed an order of the Appellate Division, Second Department, dated June 6, 1983, which unanimously reversed a judgment of the New York Supreme Court, Kings County, entered March 31, 1982, which granted the petition, and dismissed the petition as barred by the four month statute of

limitations in CPLR section 217. By an order dated and entered February 16, 1983, the New York Court of Appeals, without opinion, denied petitioner's motion for reargument.

2. Petitioner's claim that respondents wrongfully revoked his teaching license without giving him an evidentiary hearing of disputed factual issues whether he possessed or lacked the qualifications for such license prescribed by respondents' by-laws and by their examination announcement presents a federal constitutional question under section 1 of the Fourteenth Amendment to the Constitution of the United States to which the four month statute of limitations in section 217 of the New York Civil Practice Law and Rules does not apply.

In *Kadragic v. State University of New York,* 73 A.D.2d 638, 422 NYS2d 753, 754, the Appellate Division of the New York Supreme Court said:

> "The only one of plaintiff's several claims which we find persuasive is that she was denied a continuing appointment in retaliation for the exercise of her constitutional rights, i.e. the right to her own political beliefs. We hold that she has introduced evidence sufficient to entitle her to a trial upon the issue of whether such appointment was denied to her for constitutionally impermissible reasons (see Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570).
>
> Defendants contend that the four-month Statute of Limitations (see CPLR 217) bars the instant action. This contention is without merit. The Statute of Limitations set forth in section 217 does not apply to a declaratory judgment action contesting the constitutionality of an administrative act even though an article 78 proceeding might have been commenced as an

alternative (see *Lutheran Church in America v. City of New York, 27 A.D.2d 237, 278 N.Y.S.2d 1; Romer v. Leary,* 2 Cir., 425 F.2d 186; *Swan v. Board of Higher Education,* 2 Cir., 319 F.2d 56; 1 Weinstein-Korn-Miller, N.Y. Civ. Prac., par. 217.03)."

In *Romer v. Leary,* 425 F.2d 186, 187 (2d Cir. 1970), the Court said:

"It is now settled by *Swan v. Board of Higher Education,* 2 Cir. 1963, 319 F.2d 56, that in a suit seeking declaratory and injunctive relief which is based on the Civil Rights Act, 42 U.S.C. §1983, the applicable limitation in a case arising in New York is the three year limitation now provided for suits 'to recover upon a liability *** created or imposed by statute' by what is now CPLR §214, subdivision 2. As the Court noted in *Swan,* 319 F.2d at 60, it is an open question whether the four month limitation is the kind to which the federal courts will look in the absence of a federal limitation or whether, if it were, it should not be rejected as substantially impairing the federal right."

In *Johnson v. Railway Express Agency,* 421 U.S. 454, 462 (1974), the Court said:

"Since there is no specifically stated or otherwise relevant federal statute of limitations for a cause of action under §1981, the controlling period would ordinarily be the most appropriate one provided by state law."

In *Keyse v. California Texas Oil Corp.,* 590 F.2d 45, 47, (2d Cir. 1978), the Court said:

"The statute of limitations for claims brought under 42 U.S.C. §1981 is derived from the most analogous state statute. *Johnson v. Railway Express Agency,*

421 U.S. 454, 462, 95 S. Ct. 1716, 44 L.Ed. 2d 295 (1975). The applicable statute of limitations in a federal civil rights case brought in New York is the three years provided by N.Y.C.P.L.R. §214(2)—liability based on a statute. See, e.g., *Kaiser v. Cahn*, 510 F.2d 282, 284-85 (2d Cir. 1970)."

Petitioner's claim to a due process evidentiary hearing of disputed factual issues whether he had the qualifications for license prescribed by respondents presented a federal constitutional question under the 14th Amendment to the Constitution of the United States.

Petitioner's presentation of his constitutional claim by his motion for reargument in the New York Court of Appeals made applicable to his constitutional claim the New York three year statute of limitations in CPLR §214(2). *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975).

Petitioner commenced this suit against the respondents on July 2, 1980.

An affirmation by respondents' attorney, Marian A. Campbell, stated (36):

"8. Petitioner appealed his dismissal to the Office of Appeals and Review of the Board of Education pursuant to section 105A (now 4.3.4A) of the by-laws of the Board of Education.

9. By letter dated February 16, 1978, petitioner was advised that the Chancellor would take no action on petitioner's appeal. A copy of this letter is annexed hereto as Respondents' Exhibit 'C.'

10. Since no further action was taken by respondents on petitioner's appeal, February 16, 1978 is deemed to be the date on which respondents

rendered a final decision for statute of limitations purposes."

Assuming, *arguendo*, that respondents' letter of February 16, 1978 was a "final decision," as claimed by respondents, CPLR 214(2) gave the petitioner three years from February 16, 1978, namely, until February 16, 1981, to sue the respondents on his claim that section 1 of the 14th Amendment gave him a constitutional right to an evidentiary hearing of disputed factual issues whether he had the prescribed qualifications for his teaching license, so that this suit was timely commenced on July 2, 1980, within the three year period.

Actually, February 16, 1978, was not the date of respondents' "final decision." On April 24, 1979, petitioner's labor union representative, wrote to respondents and inquired about petitioner's "status with regard to two homebound licenses" (57). Respondents sent an undated reply, which concluded "since his licenses were removed by the Board of Examiners, a hearing of this matter would be moot" (58).

Respondents' last word and "final decision" concerning the petitioner was on March 7, 1980—within the four months prescribed by CPLR 217—when they wrote to the petitioner "that the reason you were not selected for appointment as a Homebound Teacher was that the Division of Special Education exercised its discretionary authority in not requesting your appointment" (27). Respondents meant by this statement that they exercised a claimed right under New York statutes to select one of three eligibles on a competitive civil service eligible list by "passing over" and not appointing the petitioner from such eligible list.

In revoking petitioner's license, respondents claimed in 1976 that they had revoked both his first teaching license issued in 1972 resulting from his having passed the examination announced September 15, 1971 (herein referred to as the "1972 license"), and the subsequent license resulting from his having passed the examination announced November 3, 1972 (herein referred to as the "1973 license") (24, 80, 81).

On November 29, 1979, respondents wrote to petitioner to "clarify your status for you," stating that only his 1972 teaching license was revoked, and not his 1973 license, and that he was not appointed from the 1973 eligible list (26). Respondents claimed a statutory right to "pass over" the petitioner by not selecting him for appointment under the provisions of section 61(1) of the New York Civil Service Law that appointing officers may select and appoint one out of the three eligibles standing highest on a competitive civil service eligible list.

Thus, petitioner's constitutional claim is timely within the three year statute of limitations in CPLR §214(2).

It is also timely under CPLR 217, when consideration is given to respondents' delays and ambiguities in informing the petitioner of their final decision.

In *Board of Regents v. Tomanio,* 446 U.S. 478, 483 (1979), the Court said that "the federal courts were obligated not only to apply the analogous New York Statute of limitations to respondent's federal constitutional claims, but also to apply the New York rule for tolling that statute of limitations." The court also cited with approval decisions by the federal Court

of Appeals for the Second Circuit "that New York's 3-year time limitation for actions 'to recover upon a liability, penalty or forfeiture created or imposed by statute" governs §1983 actions brought in Federal District Court in New York. *Romer v. Leary,* 425 F.2d 186 (1970); *Meyer v. Frank,* 550 F.2d 726, cert. denied, 434 U.S. 830 (1977).

In *Board of Regents v. Tomanio, supra,* 446 U.S. 478, 486, footnote 7 noted that Section 204(b) of the New York Civil Practice Law and Rules provides that the statute of limitations is tolled during the time between the service of a demand for arbitration and the date of a final judgment that arbitration of the controversy is not available. In this case, petitioner's labor union demanded arbitration which has not yet been heard and decided.

In this case, no arbitration of the revocation of petitioner's teaching license and termination of his teaching employment has been made to this date; and no such decisions had been made by December 1, 1983, when the New York Court of Appeals made a decision which affirmed an order of the Appellate Division dismissing petitioner's suit on the ground that it was barred by the four month statute of limitations in CPLR §217.

In the *Tomanio* case, supra, the Court also said (446 U.S. 487-8):

> "defendants may not, by tactics of evation, prevent the plaintiff from litigating the merits of a claim, even though on its face the claim is time-barred. These exceptions to the statute of limitations are generally referred to as 'tolling' and, as more fully discussed in

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), are an integral part of a complete limitation policy."

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

MORRIS WEISSBERG
Attorney for Petitioner

Dated: May 11, 1984

APPENDIX "A"
ORDER OF N.Y. COURT OF APPEALS DATED DECEMBER 1, 1983 AFFIRMING ORDER OF APPELLATE DIVISION OF N.Y. SUPREME COURT, JUNE 6, 1983

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

In the Matter of LESLIE LUBIN,

Appellant,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Respondents.

The appellant in the above entitled appeal appeared by Eugene M. Kaufman, P.C.; the respondents appeared by Hon. Frederick A. O. Schwarz, Jr., Corporation Counsel.

The Court, after due deliberation, orders and adjudges that on review of submissions pursuant to Rule 500.2(b) (22 NYCRR 500.2[g]), order affirmed, with costs, in a memorandum. Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer, Simons and Kaye concur.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, Kings County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals.

s/Donald M. Sheraw
Donald M. Sheraw, Clerk of the Court

Court of Appeals
Clerk's Office, Albany
December 1, 1983

APPENDIX "B"
OPINION OF N.Y. COURT OF APPEALS
DATED DECEMBER 1, 1983

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of LESLIE LUBIN,

Appellant,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Respondents.

(SSM 222) Eugene M. Kaufman, PC, Mineola, for appellant

Frederick A. O. Schwarz, Jr., N.Y.C. Corporation Counsel (Larry A. Sonnenshein of counsel) for respondents.

MEMORANDUM

The order of the Appellate Division should be affirmed, with costs.

CPLR 217 provides that an article 78 proceeding "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner." For a determination to be

final it must be clear that the petitioner seeking review has been aggrieved by it (*Matter of Martin v. Ronan*, 44 NY2d 374, 380). Petitioner was informed on April 21, 1976 that his services were being terminated for failure to meet the requirements of his 1972 license. Petitioner clearly was aggrieved by this determination and his failure to commence a proceeding within 4 months requires dismissal of this proceeding. Inasmuch as petitioner's appointment was based on his 1972 license, respondents' misstatements and subsequent clarification concerning petitioner's 1973 license cannot be viewed as relevant to respondents' decision, in 1976 to rescind petitioner's 1972 license and terminate his services. In addition, petitioner's direction of correspondence to respondents, which can be viewed, at most, as a request for reconsideration, does not toll or revive the statute of limitations (see *Matter of DeMilio v. Borghard*, 55 NY2d 216). Finally, petitioner's contention that his invocation of a grievance proceeding, which was determined not to be available under the United Federation of Teachers collective bargaining agreement, tolled the statute of limitations also is unavailing.

* * *

On review of submissions pursuant to Rule 500.2(b) (22 NYCRR 500.2[g]), order affirmed, with costs, in a memorandum Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer Simons and Kaye concur.

Decided December 1, 1983

APPENDIX "C"
ORDER OF N.Y. COURT OF APPEALS DATED FEBRUARY 16, 1984 DENYING MOTION FOR REARGUMENT

Present, HON. LAWRENCE H. COOKE
Chief Judge, Presiding

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of February, A.D. 1984

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the Application
of LESLIE LUBIN,

Appellant,

v.

THE BOARD OF EDUCATION OF
THE CITY OF NEW YORK, et al.,

Respondents.

A motion for reargument in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same

hereby is denied with twenty dollars costs and necessary reproduction disbursements.

s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX "D"
ORDER OF APPELLATE DIVISION OF N.Y. SUPREME COURT, DATED JUNE 6, 1983, REVERSING JUDGMENT GRANTING PETITION AND DISMISSING PETITION

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 6, 1983

HON. FRANK A. GULOTTA, Justice Presiding
HON. FRANK D. O'CONNOR,
HON. LAWRENCE J. BRACKEN,
HON. RICHARD A. BROWN, Associate Justices

In the Matter of LESLIE LUBIN,

Respondent,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Appellants.

In the above entitled proceeding pursuant to CPLR article 78 to, *inter alia*, compel the Board of Education of the City of New York to restore petitioner to his former position as a teacher of the City of New York, et al., petitioners, having appealed to this court from a judgment of the Supreme Court, Kings County, dated March 30, 1982, which, *inter alia*,

granted the petitioner; and the said appeal having been argued by Larry A. Sonnenshein, Esq., of counsel for appellants and submitted by Eugene M. Kaufman, Esq., of counsel for respondent, due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgment appealed from is hereby unanimously reversed, on the law, without costs or disbursements, and the petition dismissed.

Enter:
IRVING N. SELKIN
Clerk of the Appellate Division

APPENDIX E
OPINION OF APPELLATE DIVISION
DATED JUNE 6, 1983

HON. FRANK A. GULOTTA, J.P.
HON. FRANK D. O'CONNOR
HON. LAWRENCE J. BRACKEN
HON. RICHARD A. BROWN, JJ.

In the Matter of LESLIE LUBIN,

Respondent,

v.

THE BOARD OF EDUCATION OF
THE CITY OF NEW YORK, et al.,

Appellants.

Frederick A. O. Schwarz, Jr., Corporation Counsel, New York, N.Y. (Francis F. Caputo and Larry A. Sonnenshein of counsel), for appellants.

Eugene M. Kaufman, P.C. Mineola, N.Y., for respondent.

In a proceeding pursuant to CPLR article 78 to, *inter alia,* compel the Board of Education of the City of New York to restore petitioner to his former position as a teacher of homebound children, the appeal is from a judgment of the Supreme Court, Kings County (LEONE, J.), dated March 30, 1982, which, *inter alia,* granted the petition.

Judgment reversed, on the law, without costs or disbursements, and petition dismissed.

Assuming, *arguendo*, that Special Term correctly decided that the determination in issue became final and binding upon the petitioner only when the appellants "issued its [sic] own unequivocally clear and final determination as to whether either of petitioner's licenses [for the teaching of homebound children] were [still] in effect," the four months within which the petitioner was required to commence the instant proceeding (CPLR 217) must have commenced running no later than November 29, 1979, the date upon which he was notified by the board of education that his 1973 license as "Teacher of Homebound Children" was valid but that he had been appointed to his former position as a teacher of homebound children from the 1972 rather than the 1973 eligibility list and that his appointment thereunder had been terminated on June 30, 1976 upon the revocation of his 1972 license. Accordingly, the instant proceeding, which was not commenced until July 1, 1980, is time barred.

The ensuing correspondence between the parties, which was in effect, an application for reconsideration by the board of education of its prior determination, neither tolled the applicable Statute of Limitations nor began anew the time within which review could be sought (see *Matter of De Milio v. Borghard*, 55 NY2d 216, 221-222; *Matter of Trivedi v. State Bd. of Law Examiners*, 86 AD2d 719; cf. *Matter of Camperlengo v. State Liq. Auth.*, 16 AD2d 342).

On this analysis, we need pass upon no further issue.

GULOTTA, J.P., O'CONNOR, BRACKEN and BROWN, JJ., concur.

June 6, 1983

APPENDIX "F"
JUDGMENT OF NEW YORK SUPREME COURT KINGS COUNTY, DATED MARCH 30, 1982 GRANTING PETITION

At a Special Term, Part I of the Supreme Court of the State of New York, County of Kings, held at the Courthouse, Civic Center, Brooklyn, New York, on the 30th day of March, 1982.

PRESENT: HON. SEBASTIAN LEONE, Justice

In the Matter of the Application of
LESLIE LUBIN,

Petitioner,

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and THE BOARD OF EXAMINERS OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

Petitioner having commenced this proceeding pursuant to Article 78, CPLR, for an Order and Judgment directing respondent Board of Education to reinstate him to the position that he held in 1976, from which he was improperly and illegally removed; and for a further Order and Judgment directing respondent Board of Examiners to reinstte his 1972 license as a Teacher of the Homebound, on the grounds that

petitioner had met all of the requirements for said license; and for a further Order and Judgment awarding petitioner all the rights, privileges and benefits that he would otherwise have been entitled to had not his rights been violated by the actions of the respondents and respondents having cross-moved for an order dismissing the petition;

NOW, upon reading and filing the Petition verified July 1, 1980, together with the exhibits annexed thereto, and respondents' cross-motion dated August 29, 1980, together with the affirmation of Marian A. Campbell dated august 29, 1980, and the affirmation of Eugene M. Kaufman, dated October 13, 1980, submitted in opposition to the Cross-motion, and the Reply Affirmation of Marian A. Campbell, dated September 22, 1980, submitted in support of the cross-motion, together with the decision of Justice Max Cooper, of this Court, dated January 7, 1981, denying the cross-motion, together with the Order of Justice Cooper, dated February 23, 1981, denying the cross-motion and directing respondents to serve and file their answer to the petition; together with respondents' answer verified April 6, 1981, together with the exhibits annexed thereto, submitted in opposition to the petition, and petitioner's reply, verified April 24, 1981, together with the affidavits of Leslie Lubin sworn to April 24, 1981 and of Eugene M. Kaufman, sworn to April 30, 1981, submitted in support of the petition; and this Court (Leone, J.), having issued an interim order on May 28, 1981, setting the matter down for a hearing to determine whether petitioner had, in fact, met the requirements for the 1972 license as a Regular Teacher of the Homebound; and this matter having come on before Justice Sebastian Leone, and having read the affidavits of Eugene M. Kaufman

and Leslie Lubin both sworn to December 29, 1981, together with the exhibits attached thereto submitted in support of the petition, and the affirmation of Maralyn B. Fairberg dated January 15, 1982, together with the exhibits annexed thereto, together with the reply affirmation of Eugene M. Kaufman, dated January 27, 1982, and after having heard EUGENE M. KAUFMAN, ESQ., attorney for the petitioner, in support of the petition, and ALLEN G. SCHWARTZ, ESQ., Corporation Counsel (Maralyn B. Fairberg, Esq., of counsel) in opposition thereto, and after due deliberation, this Court having rendered its decision, dated January 25th, 1982.

NOW, on motion of EUGENE M. KAUFMAN, Esq., attorney for the petitioner, it is

ORDERED AND ADJUDGED that petitioner met the requirements for the 1972 license as Teacher of the Homebound; and it is further

ORDERED AND ADJUDGED that Respondent Board of Examiners of the Board of Education of the City of New York, improperly terminated petitioner's license as a Teacher of the Homebound; and it is further

ORDERED AND ADJUDGED that petitioner was improperly terminated as a Regular Teacher of the Homebound by both the Board of Education of the City of New York and the Board of Examiners of the Board of Education of the City of New York, and it is further

ORDERED AND ADJUDGED that the petition herein is granted in all respects; and it is further

ORDERED AND ADJUDGED that petitioner be reinstated to his position as a Regular Teacher of the Homebound, together with all of the rights, benefits and privileges to which he would otherwise have been entitled to had not his rights been violated by the actions of the respondents, such rights, benefits and privileges including, but not limited to Back Pay, Tenure, Seniority, Health Insurance payments and payments to the New York City Teachers Retirement System, all with interests keeping with the back pay restraint of *Jerry v. Board of Education*, 35 NY2d and it is further

ORDERED AND ADJUDGED that petitioner receive costs in the amount of $

ENTER

s/Sebastian Leone
J.S.C.

s/Anthony N. Durso
Clerk

Filed
'82 March 31 A10:51
Kings County Clerk

APPENDIX "G"
OPINION OF NEW YORK SUPREME COURT (COOPER, J.) DATED JANUARY 7, 1981

Petitioner commenced this Article 78 proceeding seeking an order directing respondents to reinstate the petitioner to the position of Teacher of Homebound Children, to reinstate petitioner's license as a Teacher of Homebound Children, and to validate petitioner's 1972 and/or 1973 license(s) as Teacher of Homebound Children.

The respondents seek to dismiss the proceeding on the grounds that the petition is time barred; the petitioner failed to exhaust his administrative and contractual remedies with respect to part of the relief requested, and petitioner has elected to seek the relief requested by appealing to the State Commissioner of Education.

The petitioner seeks three forms of relief: Reinstatement as Teacher of the Homebound, reinstatement of his 1972 license, and extension of his 1973 license in that same title. Petitioner concedes, however, that his third cause of action has been rendered moot by actions of the New York State Legislature. That cause of action is thus dismissed.

As to the other causes of action, the respondents have not set forth an answer, but rather have raised several affirmative defenses, and have cross moved to dismiss the petition on the following grounds: the petition is barred by the statute of limitations; the petitioner has not exhausted his administrative remedies; there is an appeal pending before the Commissioner of Education, and petitioner's claim for

validation of his 1973 license is moot. There is substantial case law which defines the period from which the statute of limitations begins to run in an administrative matter (see *Fiore v. Board of Education Retirement System*, 48 AD2d 850 (2d Dept. 1975), affd. 39 NY2d 1016 (1976)). Basically, the statute begins to run when the effect of the determination becomes final. A petitioner cannot extend the statute by asking the decision-making body to reconsider the matter.

In the case at bar the respondent Board of Education issued erroneous rulings which misled the petitioner into believing that petitioner retained a status which the Board was later to claim petitioner did not have. The respondents have admitted that "due to confusion with respect to which of petitioner's licenses had been revoked, the personnel division of the Board of Education erroneously stated to petitioner that his 1973 license had been revoked." Petitioner thus directed his efforts into being reinstated to his position on the basis that his 1973 license was not revoked. Even though the respondents later accepted his argument as to the continued existence of his 1973 license, petitioner was not reinstated to his previous capacity.

Because the determination regarding the validity of petitioner's 1972 license was so closely intertwined with the effect that the determination regarding the 1973 license had on petitioner's status, the statute of limitations did not begin to run until the respondents issued its own unequivocally clear and final determination as to whether either of petitioner's licenses were in effect. Furthermore, a statute of limitations does not begin to run until after completion of the

grievance procedure (*Whitley v. Board of Education*, 65 AD2d 821, 410 NYS2d 345 (2d Dept. 1978)).

The grievance in this matter has been held not to be covered by the contract. Under the contract between the Board of Education and the United Federation of Teachers, the next step would be arbitration. However, since the grievance is not covered by the contract it cannot go to arbitration (Acting Superintendent of Schools of Liverpool Central School District, 42 NY2d 509, 399 NYS2d 189 (1977)). Petitioner has thus exhausted his administrative remedies.

The appeal that was filed before the Commissioner of Education seeking relief similar to that sought in the third cause of action—extension of his 1973 license—does not apply to the relief sought in either of the first two causes of action, i.e., reinstatement to his position as Teacher of the Homebound and reinstatement of his 1972 license for that position.

For the above stated reasons, the respondents' cross motion to dismiss the first two causes of action is denied. The third cause of action for reinstatement of the 1973 license has been rendered moot by actions of the State Legislature. The respondents shall file and serve an answer to the petition within 20 days of the entry of an order hereon.

Settle order.

J.S.C.

ORDER OF HON. MAX E. COOPER DATED FEBRUARY 23, 1981

At a Special Term, Part I of the Supreme Court of the State of New York to be held in and for the County of Kings, Civic Centre, Brooklyn, N.Y. on the 23rd day of February, 1981

PRESENT:
HON. MAX E. COOPER, Justice

In the Matter of the Application of
LESLIE LUBIN,

Petitioner,

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and THE BOARD OF EXAMINERS OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

Petitioner, having commenced this Article 78 proceeding seeking an order directing respondents to reinstate petitioner to the position of Homebound Children, to reinstate petitioner's license as a Teacher of Homebound Children, and to validate petitioner's 1972 and/or 1973 license(s) as Teacher of Homebound Children, and respondents having cross-moved for an order dismissing the petition, on the grounds that the petition is time-barred, the petitioner failed to exhaust

his administrative and contractual remedies and petitioner elected to seek the relief requested by appealing to the State Commissioner of Education, and this matter having duly come before this Court to be heard,

NOW upon reading and filing of the Notice of Petition, dated July 1, 1980, the petition, with Exhibits "A" through "L" annexed thereto, verified by Leslie Lubin on July 1, 1980 the Notice of Cross-Motion, dated August 15, 1980, the affirmation of Marian A. Campbell, dated august 29, 1980 with Exhibits "A" through "E" annexed thereto, the Answering Affirmation of Eugene M. Kaufman, dated October 13, 1980, and the Reply Affirmation of Marian A. Campbell, dated October 22, 1980, and upon hearing Allen G. Schwarz, Esq., Corporation Counsel [Marian A. Campbell, Esq., of counsel] attorney for respondents, in support of the motion, and Eugene M. Kaufman, Esq., attorney for petitioner, in opposition thereto, and after due deliberation, and filing of the Court's decision, it is

ORDERED that respondents' cross-motion to dismiss petitioner's first and second causes of action is denied, and it is further

ORDERED that petitioner's third cause of action is moot and is dismissed, and it is further

ORDERED that respondents shall serve their answer within twenty days after receipt of this Order with Notice of Entry.

ENTER
s/Max E. Cooper
J.S.C.

APPENDIX "H"
OPINION OF NEW YORK SUPREME COURT (LEONE, J.) DATED MAY 28, 1981

In this Article 78 proceeding, petitioner seeks an order directing respondents to reinstate him to the position of Teacher of Homebound Children, to reinstate his license as a Teacher of Homebound Children and to validate his 1972 and/or 1973 licenses as Teacher of Homebound Children.

Respondents moved to dismiss the petition on the grounds that the petition was time barred and on other grounds. The motion was denied by Justice Cooper in January of this year. Respondents then served an answer and the matter came on to be heard before the Court on May 20th.

In 1972 petitioner was informed that he had passed the examination for Teacher of Homebound Children (1972 License). In 1973 petitioner was informed that he had passed a second examination for Teacher of Homebound Children (1973 License). In 1974 petitioner was appointed a Teacher of the Homebound Children. Due to possible confusion as to which license petitioner was appointed under, petitioner was caused to complete two separate commencement of service certificates (see RESPONDENTS' EXHIBIT 3 AND PETITIONER'S EXHIBIT D). Respondents processed only the certificate regarding the 1972 license. Accordingly the Court finds that petitioner was appointed under the 1972 license.

Petitioner had until September 1, 1975 to complete all of the eligibility requirements in order to keep the 1972 license (see RESPONDENTS' EXHIBIT 1,

page 1). Respondents contend that petitioner needed 320 days of satisfactory teaching service to complete his eligibility requirements and that petitioner only had 220 days of service. Petitioner contends that he had in excess of 400 days of teaching service. From the papers before the Court, more particularly Respondents' Exhibit 8 and Petitioner's Exhibit M, it is unclear whether petitioner taught the 320 days at issue. A hearing is required to determine this issue. Accordingly, the parties are directed to appear before this Justice on June 22, 1981 at 9:30 a.m. in room 365 for a hearing as to the days of petitioner's teaching experience prior to September 1, 1975. Respondents shall produce all necessary and relevant documents regarding petitioner's teaching service prior to September 1, 1975 at that time. If the parties can submit an agreed statement of fact as to said issues prior thereto, the hearing may be dispensed with.

HON. SEBASTIAN LEONE
J.S.C.

APPENDIX "I"
OPINION OF NEW YORK SUPREME COURT (LEONE, J.) DATED JANUARY 25, 1982

By a prior interim memorandum decision dated May 28, 1981, this Court directed a fact finding hearing to narrow the issues for a final determination. Subsequent thereto informal conferences and discovery were held to aid the Court in its determination and final submissions were submitted January 13, 1982.

The parties have stipulated that petitioner has satisfied the alternate 1(d) requirement (see Fairberg, affirmation of January 15, 1982, item 8). However the parties are in dispute as to whether petitioner has satisfied the alternate 2(b)(1) requirement of 160 days. After a review of the record, the Court finds that petitioner has satisfied the necessary 160 days of teaching service within the purview of the required subject area.

Accordingly, the petition is granted in keeping with the back pay restraint of *Jerry v. Board of Education*, 35 NY2d 534, 545.

Settle judgment.

83-1862
1c

No. 83 - 1862

In The
Supreme Court of the United States
October Term, 1984

LESLIE LUBIN,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and THE BOARD OF EXAMINERS OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, AND/OR THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

MORRIS WEISBERG
Attorney for Petitioner
15 Park Row
New York, NY 10038
(212) 964-0492

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

SUPPLEMENT

LESLIE LUBIN,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and THE BOARD OF EXAMINERS OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

EXPLANATION

This is a supplement to a Petition of Certiorari mailed on May 14th, 1984. The Reasons for Granting the Writ are:

1. Respondents Violated Petitioner's Constitutional Right to a Procedural Due Process Evidentiary Hearing by Revoking his Regular Teaching License Without an Evidentiary Hearing of Disputed Factual Issues Whether he had the Prescribed Qualifications for Such License.

2. The Three Year Statute of Limitations in N.Y. CPLR 214(2), and not the Four Month Statute of

Limitations in N.Y. CPLR 217, Applies to Petitioner's Aforesaid Federal Constitutional Claim. Petitioner Timely Commenced this Suit Within such Three-Year Period.

REVIEWED TABLE OF CONTENTS

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

LESLIE LUBIN,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and THE BOARD OF EXAMINERS OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

MEMORANDUM OPPOSING CERTIORARI

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of the
City of New York,
Attorney for Respondents
100 Church Street
New York, New York 10007
(212) 566-3323

FRANCIS F. CAPUTO,
LARRY A. SONNENSHEIN,
of Counsel.

TABLE OF AUTHORITIES

No. 83-1862

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

LESLIE LUBIN,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and THE BOARD OF EXAMINERS OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

MEMORANDUM OPPOSING CERTIORARI

This case involves a challenge to the administrative determination to terminate petitioner's services as a teacher of homebound children based on his failure to meet all of the eligibility requirements for the required license. In dismissing the proceeding, the Appellate Division, First Department, of the Supreme Court of the State of New York and the Court of Appeals of the

State of New York correctly concluded that, pursuant to the appropriate state statute of limitations and well-settled state case law, the proceeding was time-barred.*

As is clearly evident from the petition for a writ of certiorari, pp. 17-18, 20, this Court lacks jurisdiction to review the order of the Court of Appeals since the federal questions which the petition now seeks to raise before this Court were never properly raised, or even considered, in the state courts. See 28 U.S.C.A. §1257(3). The petition concedes that petitioner did not brief or argue the federal questions during the adjudication of his

*Since the New York Court of Appeals found that petitioner's action accrued on April 21, 1976, the day that he was informed that his services were being terminated for failure to meet the licensing requirements, petitioner's argument that the Court should have applied the three year statute of limitations of Section 214(2) of the New York Civil Practice Law and Rules (CPLR) instead of the four month statute of limitations of CPLR §217 is unavailing because petitioner's proceeding would still be time barred, the proceeding having been commenced on July 2, 1980, more than four years after its accrual date.

proceeding in the state court of original jurisdiction or before the state appellate courts prior to the determination of the two appeals. The petition further concedes that petitioner first raised the federal questions for which he now seeks this Court's review on a motion for reargument before the Court of Appeals, New York State's highest court, after that Court had already decided his appeal. The Court of Appeals denied that motion for reargument. In denying the motion for reargument and thus refusing to consider the new federal questions which petitioner has sought to raise, the Court of Appeals was following its well-settled rule that "A motion for reargument is not an appropriate vehicle for raising new questions, such as those now urged upon us, which were not previously advanced either in this Court or in the courts below." Simpson v. Loehmann, 21 NY2d 990 (1968) See, also, Matter of United States of America v. Schmuck, 293 N.Y. 768 (1944); Mississippi Shipbuilding Corp. v. Lever Bros. Co., 237 N.Y. 565 (1924); Reilly v. Steinhart,

218 N.Y. 660 (1916); Cohen and Karger, Powers of the New York Court of Appeals, pp. 628, 694-696.

The failure of petitioner to raise properly the federal questions for consideration in the state courts deprives this Court of jurisdiction to review the Court of Appeals' order. Monks v. New Jersey, 398 U.S. 81 (1970); see Hill v. California, 401 U.S. 796, 805 (1971); Street v. New York, 394 U.S. 576, 582 (1969).

Therefore, the petition for a writ of certiorari should be denied.

May 30, 1984

Respectfully submitted,

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of the
City of New York,
Attorney for Respondents.

FRANCIS F. CAPUTO,
LARRY A. SONNENSHEIN,
of Counsel.

No. 83-1862

In The
Supreme Court of the United States
October Term, 1984

LESLIE LUBIN,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and THE BOARD OF EXAMINERS OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

PETITIONER'S REPLY MEMORANDUM

MORRIS WEISSBERG
Attorney for Petitioner
15 Park Row
New York, N.Y. 10038
(212) 964-0492

Dick Bailey Printers, 203 Richmond Avenue ■ Staten Island, New York 10302
Tel.: (212) 447-5358 — (516) 222-2470 — (914) 682-0848

TABLE OF CASES

NO. 83-1862

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

LESLIE LUBIN,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and THE BOARD OF EXAMINERS OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondents.

PETITIONER'S REPLY MEMORANDUM

I

There is no merit to respondents' argument in their memorandum opposing certiorari (pp. 2-4), that petitioner did not timely present to State courts of the State of New York a federal constitutional question whether respondents violated petitioner's federal constitutional right to a procedural due process evidentiary hearing by revoking his license as a teacher of homebound children without a hearing of evidence of disputed factual issues whether petitioner had the qualifications for such license prescribed by

respondents' by-laws, and by their announcement of examination for such license.

In our petition for certiorari (p. 6) we said that pursuant to a collective bargaining contract between petitioner's labor union and the respondent school board, such labor union demanded arbitration of a grievance, claiming that the school board unreasonably revoked petitioner's teaching license for alleged failure timely to complete required courses of study, although petitioner was fully qualified and had obtained a permanent State certificate of qualification as a teacher of homebound children (Record, p. 157); and that such demand for arbitration was pending, undecided, on May 11, 1984, when we filed our petition for certiorari.

A demand for arbitration by the United Federation of Teachers demanded arbitration "concerning the Board's refusal to assign grievant to a teaching position"; and the remedy sought was "A finding that Articles Twenty and Twenty-one have been violated, and, further, a directive that grievant be assigned to teach and compensated for the entire period during which the Board has refused to permit him to work."

The demand for arbitration further stated:

> "Pursuant to Article Seventy-Five of CPLR unless you apply to stay the arbitration within twenty days after service of this notice upon you, you shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with, and from asserting in court the bar of a limitation of time."

The school board made no application to stay arbitration. Pursuant to CPLR 7503, the school board was barred from seeking to stay arbitration after expiration of the twenty day period.

The above-quoted statement is similar to the provisions in CPLR 204(b) that the time during which an arbitration proceeding is pending shall not be counted as part of the time elapsed for statute of limitations purposes.

The Trial Court's decision stated (188-190):

> "* * * a statute of limitations does not begin to run until after completion of the grievance procedure (Whitley v. Board of Education, 65 A.D.2d 821, 410 NYS2d 345 (2d Dept. 1978)."

In this case, the May 18, 1984 agreement between the school board and the labor union terminated the pending arbitration about the revocation of petitioner's teaching license and his demand for reinstatement, and should be deemed equivalent to a completion of the grievance procedure under the *Whitley* case, *supra*.

On May 18, 1984, the school board and the labor union signed an agreement whereby the labor union agreed "not to support Mr. Lubin in any outstanding grievances now pending at any step of the grievance procedure."

On May 18, 1984, there was outstanding a grievance filed by petitioner's labor union, the United Federation of Teachers, whereby the labor union demanded arbitration of a grievance "concerning the Board's refusal to assign grievant to a teaching posi-

tion."

Such agreement between the respondent school board and petitioner's labor union was made without notice to petitioner, without petitioner's consent, and it was contrary to petitioner's interest.

The above quoted agreement was a supervening change in the facts, which occurred after the New York Court of Appeals made its decision on December 1, 1983, affirming the dismissal of the petition as barred by the four month statute of limitations in CPLR 217.

In the exercise of its appellate jurisdiction, this Court has the power to make such disposition of this case as justice requires in the light of this change in the facts, which this Court may consider in its decision of this case. *Patterson v. Alabama*, 294 U.S. 600 (1934); *Herndon v. Georgia*, 295 U.S. 441 (1934); Moore, Federal Practice, Supreme Court Practice, vol. 12, pp. 8-59 to 8-63.

We ask this Court to reverse the judgment dismissing the petition, and to remand this case to the New York courts, with directions that the parties shall proceed to arbitrate the grievance which petitioner's labor union filed on his behalf.

II.

In their memorandum (p. 2, footnote) respondents also argued that application of the three-year statute of limitations in CPLR 214(2), instead of the four month statute of limitations in CPLR 217, would not help the petitioner, because he commenced this suit on

July 2, 1980, more than three years after the school board notified him that his license would be revoked and his employment would be terminated on June 30, 1976.

In our petition for certiorari we cited *Board of Regents v. Tomanio*, 446 U.S. 478, 483 (1979) that federal courts are required "to apply the New York rule for tolling that statute of limitations"; and that in arbitration cases, CPLR 204(b) provides that the statute of limitations is tolled during the time between the service of a demand for arbitration and the date of a final judgment that arbitration is not available. In this case, by analogy, CPLR 204(b) should be applied to the agreement of May 18, 1984 by respondents and the United Federation of Teachers, terminating the pending arbitration proceeding by agreeing "not to support Mr. Lubin in any outstanding grievances now pending at any step of the grievance procedure."

Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MORRIS WEISSBERG
Attorney for Petitioner

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